INDEX

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION OF THE NATIONAL EDUCATION ASSOCIATION AND THE COLORADO EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Education Association (NEA) and the Colorado Education Association (CEA) hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits in the above entitled cause.[1] Petitioners have consented to the filing of this brief,[2] but respondents have withheld

[1] Rule 42 provides that briefs amicus shall be filed at the same time as the briefs of the party whose position they support. The brief of the petitioners was due for filing on May 1, 1972. On April 27, 1972, the Clerk of the Court, by telephone, granted the requests of movants herein, NEA and CEA, for an extension of time for the filing of this motion and the attached brief to and including May 5, 1972.

[2] The written consent of the petitioners has been filed with the Clerk.

their consent. Accordingly, NEA and CEA seek leave of the Court to file their brief.

The National Education Association is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million one hundred thousand regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is (34 Stat. 805)—

> to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

The Colorado Education Association, which was founded in 1875 and incorporated in 1917, is an affiliate of NEA. A principal purpose of CEA is to promote quality education. Currently CEA has some 22,000 members, of whom approximately 3,000 are employed in the Denver School District.

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations, including CEA. Similarly, CEA's policies are determined by its Delegate Assembly, which is a body of approximately 500 representatives.

Both NEA and CEA have a deep interest in achieving and assuring equality of education for the children of all races. Reflecting this concern, NEA's Representative Assembly at its 1971 Convention adopted a specific resolution on desegregation in the public schools, which provided in part (NEA, *Handbook 1971-72*, p. 68):

> The National Education Association believes it is imperative that desegregation of the nation's schools be effected. Policies and guidelines for school desegregation in all parts of the nation must be strength-

ened and must comply with *Brown* v. *Board of Education; Alexander* v. *Holmes County Board of Education, Mississippi;* other judicial decisions and with civil rights legislation.

The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographical realignment, pairing of schools, grade pairing and satellite schools. These arrangements may require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and the spirit of the law. The Association urges that all laws of this nation apply equally to all persons without regard to race or geographic location.

Similarly at its 1970 session, CEA's Delegate Assembly resolved that:

CEA urge all Colorado school districts to move to eliminate de facto segregation through increased integration. Further, that CEA provide consultative services and publicly support local associations and school boards as they pursue this goal.

NEA and CEA desire to participate in the case at bar not only because of our interest in quality education, but also because we believe we can be of service in informing the Court as to the general character and effects of neighborhood school plans like that employed in this case. Such plans, when used in major urban areas, almost inevitably result in separation of children along racial and economic lines. This racial and economic isolation reduces the ability of school systems to provide equal educational opportunity and quality education. As the President's Commission on School Finance found:

Research results are not yet conclusive on the effect of the socio-economic backgrounds of other students on a child's educational achievement. However, it is becoming increasingly apparent that the student-mix within a school exerts a strong influence on

learning patterns of the total student body. A student body reflecting different social, economic, ethnic, and cultural family backgrounds tends to improve the learning of lower achieving students.

Accordingly, the Commission concludes that the effect of the student-mix appears to be such that equal educational opportunity is enhanced in a heterogeneous student body. Moreover, such a student body better prepares all its members for productive and creative participation in a free society.[3]

Wherefore, the National Education Association and the Colorado Education Association request that this Court grant leave to file the accompanying brief amicus curiae urging that insofar as the court of appeals sanctioned racial segregation in the "core" schools of Denver, the court's judgment should be reversed.

Respectfully submitted,

LARRY F. HOBBS
LEONARD N. WALDBAUM
HOBBS & WALDBAUM
1810 Security Life Building
Denver, Colorado 80202
Attorneys for Amicus Curiae Colorado Education Association

Of Counsel:
SHEA & GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005

STEPHEN J. POLLAK
ROBERT T. BASSECHES
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D. C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Amicus Curiae National Education Association

[3] The President's Commission on School Finance, *Schools, People & Money; The Need for Educational Reform*, p. 15 (March 3, 1972). See also, Coleman, et al., *Equality of Educational Opportunity*, (U.S. Office of Education) 1966; Mosteller & Moynihan, *On Equality of Educational Opportunity*, 42-43 (1972).

IN THE

Supreme Court of the United States

No. 71-507

WILFRED KEYES, *et al.*,
Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION AND THE COLORADO EDUCATION ASSOCIATION

I

STATEMENT

This case is before the Court on certiorari to review the holding of the court of appeals that the maintenance by the Denver School Board of segregated schools in the "core" area of the city and the resulting unequal educational opportunities afforded to minority children do not constitute a violation of the Equal Protection Clause of

the Fourteenth Amendment. The court of appeals affirmed the decision of the district court requiring enforcement of three resolutions of the Denver School Board desegregating certain predominantly Negro schools in the Park Hill area of Northeast Denver. That part of the court of appeals' judgment is not challenged in this case. It is attacked in a cross-petition for certiorari (No. 71-572) filed by respondents herein on October 23, 1971. To date, the Court has not acted upon the cross-petition.

A. The Importance of the Issues Presented.

Viewed most narrowly, this is the first case coming to this Court raising squarely issues as to the standards of proof which are to govern the federal courts in passing on the constitutionality of segregated schools in urban communities of the North and West. Viewed most broadly, the case puts in issue the question whether segregated schooling resulting in unequal educational opportunities for minority children is actionable when effectuated by the affirmative conduct of state authorities, where that conduct is found to have been pursued without segregatory motive. Whether viewed narrowly or broadly, the Court's decision can be expected to have major significance in future litigation over segregated schooling in urban communities.

B. The Proceedings Below.

1. *The Factual Setting.* The Denver public school system, serving the city and county of Denver, included at the time of record a total of 117 schools, comprising 92 elementary schools, 16 junior high schools, and 9 high schools (A. 126a).[4] This action was brought by children

[4] Citation is to the Appendix To Petition For Certiorari. This appendix contains all of the related opinions below. The record below is contained in a five-volume appendix which will be cited as "J.A." plus the page reference.

attending the Denver public schools, charging that the school board had intentionally created and/or was intentionally maintaining racially segregated schools in the school district, and was providing unequal educational opportunities to students attending those segregated schools (J.A. 5a-10a).

Plaintiffs' proof in the district court focused on the historical and existing conditions in schools serving areas of the city substantially populated by Negroes and Mexican-Americans. That proof demonstrated a high degree of segregation throughout the school system, both in student population and faculties (A. 77a-78a; 9a). It established, in addition, gross inequalities in the educational opportunity available to children attending minority schools as contrasted with white schools in the district, measured by teacher experience, teacher turnover, physical facilities and achievement levels (A. 78a-84a).

The minority schools the subject of proof were located in two adjoining areas of the city. One of these was Park Hill in Northeast Denver where seven schools were located (A. 47a, 38a).[5] During the decade of the 1960's, the northern section of this area of the city, on the frontier of the expanding Negro area, had shifted from a predominantly white to a predominantly black neighborhood (A. 47a). It was singled out for separate and special attention in the proof at trial (and in the decisions of the courts below) because of publicly announced acts of segregation practiced immediately prior to the filing of suit. Specifically, the Denver School Board, for the purpose, as found by the district court (A. 35a), of preventing the integration of minority students in the Park Hill attendance zones into predominantly white schools there and elsewhere in the city, had in June 1969 re-

[5] The schools were Barrett, Stedman, Hallett, Smith, Phillips and Park Hill Elementary Schools; and Smiley Junior High School. East High School serves the area but is located outside of it (J.A. 2022a).

scinded a series of resolutions passed by a former school board earlier that year for the purpose of desegregating those schools. This led to a separate trial on motion for preliminary injunction and interlocutory relief (by way of enforcement of the original resolutions) pending trial of the full case. (A. 20a-43a.)

The other group of schools the subject of plaintiffs' proof at trial, 20 in number (A. 140a), were located in the older "core" area of the city.[6] This area, by and large, lies just west of the Park Hill area, and is occupied predominantly by minority residents, Negroes and Mexican-Americans. (See A. 140a; J.A. 58a) At the time of the trial on the merits, no school in the core area exceeded 30 per cent in white enrollment; the student bodies of 13 of the 20 schools were less than 10 per cent white. (A. 77a-78a).[7]

Plaintiffs' proof demonstrated a sustained history of affirmative conduct by the school board effectively isolating minority groups in minority schools throughout the district and retarding or precluding integration of minority children into white schools. Actions of the school board productive of this result included: the establishment, change and elimination of optional attendance zones; the selection of sites for construction of new schools; and the use of temporary facilities within minority attendance zones (A. 48a-50a; 59a-67a). By 1960 the core area had become almost wholly minority and segre-

---

[6] We identify as core area schools those listed by the district court in its opinion of March 21, 1970 (A. 77a-78a), other than Barrett, Hallett, Smith and Stedman Elementary Schools and Smiley Junior High which are located in Park Hill and East and West High Schools which are located outside of the core and Park Hill areas (J.A. 58a).

[7] Four of the elementary schools were majority black, (Columbine (97.2%), Harrington (76.3%), Mitchell (70.9%), and Whittier (94.0%)); as were two junior high schools, (Cole 71.1%) and Morey (52.4%) and one senior high school (Manual 60.2%). Eleven elementary schools and one junior high school had majority Hispano enrollments (A. 77a-78a).

gation there could be maintained by strict adherence to a neighborhood school policy (A. 129). By this time, however, the racial composition of the adjoining Park Hill area was in transition from white to black. In that neighborhood the board during the 1960's acted affirmatively to maintain the racial make-up of the white schools by choice of locations for school construction, gerrymandering of attendance zone lines and the use of mobile units for expansion classrooms. (A. 21a-31a.) Based upon these historical facts, plaintiffs claimed that the school board had acted purposefully to segregate the schools in both the Park Hill and core areas and was adhering to a neighborhood school policy in the core area for the purpose of maintaining segregated schools. (J.A. 26a-27a; A. 73a). Defendants' answer to plaintiffs' case was that racial isolation in the Denver schools was solely the result of housing patterns. Defendants contended that the actions of the school board, which plaintiffs claimed produced or perpetuated segregated schooling, were racially neutral and taken solely for the purpose of effectuating the neighborhood school policy or other appropriate educational goals. (A. 134a; J.A. 473a.)

2. *The Decision of the District Court.* The district court, in approaching the case, compartmentalized its analysis of the evidence as if addressed to three separate, and largely independent issues: segregation in the Park Hill schools; segregation in the core area schools, and unequal educational opportunities in the minority schools generally. This is apparent from a reading of its decision (A. 47a *et seq.*) and was made explicit by the district court at the outset of that decision in announcing its approach to the case (A. 46a-47a):

> We will deal first with the schools which were the subject of preliminary hearing, considering the explanatory evidence offered at trial. Secondly, we will consider the evidence which has been offered relative to segregation and discriminatory educational oppor-

tunity in the core city schools and, finally, we will discuss possible remedies.

According to the district court's announced understanding of the prevailing law, segregated schooling constitutes an actionable violation of the Fourteenth Amendment only when it is causally connected to state action taken with the *intention* to segregate (A. 68a):[*]

> The important distinguishing factor between *de facto* and *de jure* segregation is purpose to segregate.

Starting from this asserted principle of law, the district court's analysis of each of three artificially separated issues followed this course:

a. *Segregation of the Park Hill Schools.* The Park Hill schools, as we have noted, came before the district court on motion for interlocutory relief to enforce a series of school board resolutions, later rescinded by the board, establishing a concrete program for the integration of those schools. That relief was ordered following an extensive evidentiary hearing on the motion for preliminary injunction (A. 37a), and was affirmed after full trial on the merits (A. 90a).

The district court's findings show a sustained and intentional policy of the board during the 1960's to segregate the schools in the Park Hill area. Viewing the actions taken by the board respecting each of the Park Hill

---

[*] "From the cases, we gleaned the following principles as essentials of *de jure* segregation:

(1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

(2) this action must have in fact created or aggravated segregation at the school or schools in question;

(3) a current condition of segregation must exist; and

(4) there must be a causal connection between the acts of the school administration complained of and the current condition of segregation" (A. 67a-68a).

schools individually, the court made the following findings:

(1) *Barrett Elementary School* "was opened in 1960"; "[a]t that time its student body was 89.6 per cent Negro"; "[p]resently . . . [it] is virtually 100 per cent minority students (93% Negro 7% Hispano)" (A. 21a); it was "built and opened as a segregated school" (A. 22a); "positive acts of the Board in establishing Barrett and defining its boundaries were the proximate cause of the segregation which has existed"; "we find that the board acted purposefully to create and maintain segregation at Barrett" (A. 23a);

(2) *Stedman Elementary School* "was in 1960 a predominantly 'white' school, the student body being only 4 per cent Negro" (A. 24a); "[a]s of 1968, Stedman was 94.6 per cent Negro and 3.9 per cent Anglo" (A. 25a); "[t]he actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the 'white' character of other Park Hill schools" (A. 26a);

(3) "The Negro enrollment at *Hallett Elementary School* has increased from approximately one per cent in 1960 to 90 per cent in 1968" (A. 28a, emphasis added); in a 1962 boundary change in the Hallett Elementary School optional zone "[a]ll that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo" (A. 29a); in 1965 classrooms were added to Hallett over objection "that they would increase segregation at Hallett" (A. 11a); "[t]he effect of the mobile units

and additional classrooms was to solidify segregation at Hallett" (A. 29a);

(4) "In 1960 both *Park Hill* and *Phillips Elementary Schools* were overwhelmingly Anglo in racial composition. Despite continued Negro population movement into these school districts, Park Hill and Phillips presently continue to have a majority of Anglos. . . . This characteristic of both schools is due at least in part to the efforts of the Board to prevent the use of Park Hill and especially Phillips to relieve overcrowding at Stedman" (A. 26a, emphasis added); and

(5) "In 1968 *Smiley Junior High School* was 23.6 per cent Anglo, 71.6 per cent Negro and 3.7 per cent Hispano" (A. 30a, emphasis added); the effect of repeal of Resolutions 1520 and 1524 "was to reestablish *Smiley* as a segregated school by affirmative Board action"; "[w]e therefore, find that the action . . . was willful as to its effect on Smiley" (A. 31a).

More broadly, the district court found "a high degree of interrelationship among" the schools in the northeast area "so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the other," and that "[i]t is significant to note that Board action between 1960 and 1969, such as the 1962 and 1964 boundary changes, dealt with the entire Park Hill area and had some effect on each school in that section of the city" (A. 32a). This led the court to the ultimate finding that "Between 1960 and 1969 the Board policies with respect to these northeast Denver schools show an undeviating purpose to isolate negro students," (A. 33a) and the conclusion that "[t]he policies and actions of the Board . . . [in respect of the northeast schools] constitute de jure segregation" (A. 34a; see, too, 50a, 52a).

b. *Segregation of the Core Schools.* Plaintiffs' claim as to the core area schools was that various affirmative acts as to school sites and attendance zones plus a neighborhood school policy were consciously being employed by the board to create and maintain segregated schools (A. 46a). Plaintiffs' proof demonstrated that during the 1960's the board enforced within the core area a policy of attendance at a school in immediate proximity to a student's home (A. 66a-67a). In addition, a school-by-school analysis by the district court of the activities of the school board respecting schools within the core area showed actions of the board in the form of school attendance boundary changes, changes in optional attendance zones and selection of sites for new schools directly productive of racial segregation. Among such actions were the following:

(1) *New Manual Training High School,* which was a minority school when it opened in 1953, was built near the site of the old Manual High School—in a traditional Negro area, and with the original mandatory attendance boundaries coterminous with the eastern-most boundary of the Negro population, one-half block from the school. When in 1956 the Negro population had spread further eastward, the attendance zone was revised, over the protests of the Negro community, to include the expanded Negro residential area. (A. 59a-61a.)

(2) *Morey Junior High School,* which was predominantly white in 1961, was surrounded by four optional zones (A. 63a). In 1962 two of these, each with a very low minority concentration, were transferred out of Morey and attached to a predominantly white school. The other two, with a high Negro concentration, were included in the non-optional attendance zone for Morey. In addi-

tion, in response to a "particularly strong protest" by parents of white pupils in a mandatory Morey zone, that zone was transferred to an adjoining and predominantly white junior high school. "Thus, the 1962 Morey boundary changes were largely responsible for the transformation of Morey from a predominantly Anglo school in 1961 to a predominantly minority school in 1962." (A. 64a.)

(3) Optional zones created for *Columbine Elementary School* "increased the minority concentration" at that school (A. 72a) and "were apparently employed by Anglo students as a means of escaping" to almost totally white schools (A. 66a).

In treating the Park Hill schools, findings such as these, viewed in the aggregate, had led the district court to find an overall design on the part of the Board to segregate the schools in that area, and in turn to conclude that the Board was guilty of actionable, de jure segregation. The court appears to have been influenced in arriving at that conclusion by its determination—quoted above (*supra*, p. 12)—that there was a strong interrelationship among these schools so that "any action by the Board affecting the racial composition of one would almost certainly have an effect on the others." The court emphasized, as well, the inferences derived from the school board's rescission of its earlier resolutions to effectuate integration of the Park Hill schools.

The district court's approach, however, was markedly different in evaluating the evidence applicable to the minority schools in the core area. The district court itself remarked on this (A. 57a):

> The evidentiary as well as the legal approach to the remaining schools is quite different from that which had been outlined above.

While the reasons are obscure,[9] the district court appears to have felt compelled to examine the evidence as to the minority schools outside the Park Hill area more or less in a vacuum. In so doing, it placed upon the plaintiffs the burden of establishing individually as to each school, and without reference to their showing of the board's general segregatory and discriminatory intent—evidenced, *inter alia*, by the actions with respect to the Park Hill schools—that its racial make-up was the product of purposeful discrimination by the board. Thus, the district court opinion explicitly states—not once, but at several points—that its entire inquiry concerning schools outside the Park Hill area was limited to determining whether segregatory intent could be established from the evidence introduced into the record respecting the *specific* actions taken as to *those* schools.[10] This statement of approach is confirmed by the text of the court's decision. For not once in evaluating the actions taken by the school board as to the core schools does the district court even men-

---

[9] The court recites as its reasons, that (A. 57a):

> For one thing, the concentrations of minorities occured at an earlier date and, in some instances, prior to the Brown decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.
>
> Still another distinguishing point is that we do not here have legislative action similar to the recission of Resolutions 1520, 1524 and 1581.

[10] *E.g.*, "Before discussing the acts which are relied on . . ." (A. 58a); "We now turn to a consideration of the evidence offered by plaintiffs regarding boundary changes and elimination of optional areas, which evidence is presented in support of their argument that *de jure* segregation exists in the affected schools" (A. 59a); "we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones" (A. 75a); "what we have said about the boundary changes disposes of this contention [that the neighborhood school policy was maintained for the purpose of segregation]" (A. 74a).

tion, let alone consider, the actions of the school board in the neighboring Park Hill area during the 1960's found by the district court to evidence "an undeviating purpose to isolate Negro students. . ." (A. 33a).

Similarly, in passing upon plaintiffs' claim that the core area schools were purposefully segregated, the district court did not mention or consider the substantial body of evidence that the board had treated these schools unequally in other important respects. Thus, the district court had found that the board had assigned a higher percentage of black and less experienced faculty to core area schools than elsewhere (A. 9a, 81a) and that these schools had older physical facilities than the white schools (A. 83a).

Under the district court's reading of the governing law, as we have explained (*supra*, p. 10), state action resulting in racial isolation—including adherence to a neighborhood school policy—is actionable only when taken with the purpose to segregate or to maintain existing segregated conditions (A. 68a-74a). Following the narrow evidentiary analysis which we have identified above, the court found inadequate evidence to establish the requisite segregatory motive in the core area, and thus no de jure segregation. Representative are its findings that:

> [T]here is absolutely no evidence presented, other than the fact of the 1962 [boundary] change upon which to base a finding that the School District was motivated by an intent to segregate Hispano students at Boulevard . . . [A. 73a].
>
> [T]here is a dearth of evidence that [the boundary change at Columbine] was accompanied by a purpose to segregate . . . [A. 72a].
>
> What we have said above regarding boundary changes disposes of this contention [that the neighborhood school policy was maintained or employed for the purpose of segregation] [A. 74a].

As to specified (but not all) core area schools, the district court reinforced this determination that there was no actionable, de jure segregation on the alternative grounds of "causation": it found that the allegedly discriminatory individual actions taken by the board with respect to specific core area schools had little long term effect on the racial composition of those schools given the board's neighborhood school policy and the racial housing patterns prevailing in the core area (A. 67a).[11]

c. *Unequal Educational Opportunities.* A third, distinct aspect of the district court decision involves plaintiffs' claim of unequal educational opportunities in the segregated schools throughout the Denver system. The claim was that minority children in segregated schools in the Denver school system had been deprived of educational opportunities equal to those afforded white children. The district court found that "extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools" (A. 76a). This disparity was evidenced by "significantly lower" achievement levels in the segregated schools than in the other schools in the city (A. 78a). As one cause, the district court found that the faculty in the segregated schools was markedly less experienced than in white schools, and had a far greater rate of turnover as well (A. 80a-82a). The court concluded that "[f]aculty experience is an important factor in determining the educational opportunity offered at a particular school" (A. 80a). It also found disparity in the physical plant of minority versus predominantly white schools, which it deemed contributed to the unequal educational opportunities found to exist

---

[11] Although the district court does in its findings addressed to the core area schools make generalized statements that residential patterns represent a "substantial" factor in the segregation existing in core area schools (A. 67a, 71a), only in the case of two of those schools—Manual (A. 61a, 72a) and Columbine (A. 72a)—is there a finding that the identified board action did not contribute to the long term segregation of the schools, at least in part (see A. 72a-73a).

in the segregated schools (A. 83a). Of even greater significance, the district court concluded from the extensive evidence submitted on the issue "that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity" (A. 86a-87a; see also 84a, 107a-110a, 112a-113a, 115a). In all, the "evidence establishing the inferiority of the subject [segregated] schools is so convincing that it raises a serious equitable question about subjecting any pupils, minority or majority, to them" (A. 93a).

Based on these findings, the district court (after a further hearing on the issue of remedies) ordered desegregation of the Denver schools. In so doing, the court started from the predicate that the "present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal" (A. 88a). Here, the district court found that "an equal educational opportunity is not being provided at the subject segregated schools," and that "[m]any factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns" (A. 89a).

8. *The Decision of the Court of Appeals.* As did the district court, the court of appeals treated the case as involving three distinct and separable issues: segregated schooling in Park Hill; segregated schooling in the core area; and unequal educational opportunities in segregated schools throughout the school district.

With respect to the first issue, segregated schooling in the Park Hill area, the court of appeals affirmed the finding of de jure discrimination. That determination, in the court's view, could be reversed only if, under Rule 52 of the Federal Rules of Civil Procedure, the district court's findings were clearly erroneous. Following an in-

dependent review of the evidence on this issue, the court of appeals found no basis to reverse. To the contrary it was its view that (A. 139a):

> The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. . . . In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area.

With respect to the second issue, segregated schooling in the core area, it again affirmed the district court—this time on appeal by plaintiffs—on the basis of Rule 52's "not clearly erroneous" standard. The court of appeals addressed itself only to the district court's findings that there was no improperly motivated state action as to the core area schools.[12] On this issue, the court's articulation of the governing law corresponds to that adopted by the district court (A. 134a):

> The rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. . . . However, when a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.

Applying this principle of law to the evidentiary record before the district court, the court of appeals, while recognizing that plaintiffs "have introduced some evidence

[12] See A. 148a. The court of appeals did not, at least in terms, consider the district court's alternative findings—relevant to several but not all core area schools—on "causation."

which tends to support their claim," held that "there is also evidence of record which supports the findings of the trial court, so under Rule 52 . . . , we must affirm" (A. 148a).

Examination of the court of appeals' analysis demonstrates that in reviewing the evidence as to de jure segregation in the core area it followed the same, fragmented approach of the district court, looking to the acts and policy of the school board with respect to the core area in isolation from, and without reference to, the acts concurrently being taken by the very same board to segregate the adjoining Park Hill schools. Thus, at the outset of its opinion, the court of appeals defines the case as involving "two *separate* causes of action," one involving the Park Hill schools and one the core area schools (A. 124a, emphasis added). And a review of the court of appeals decision demonstrates that its analysis followed this same approach to the evidence, not once considering in its review of the school board actions in the core area or in its determination of whether the neighborhood school policy was being maintained in that area for a racial purpose, the patent segregatory action being practiced by the board in the Park Hill area.

Similarly, the court of appeals placed on plaintiffs the burden of establishing a discriminatory motive on the part of the school board independently with respect to each area and, it appears, for the core area, for each school within that area independently. This issue of burden of proof was explicitly raised with the court of appeals on review, the court noting in its decision plaintiffs' claim "that they were required to labor under an erroneous burden of proof" (A. 147a). The court of appeals' response was that "it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent" (*Id.*):

> Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on the plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action [A. 148a].

With respect to the third issue, unequal educational opportunity in the segregated schools in the core area, the court of appeals appears to have accepted the findings which furnished the predicate for the relief afforded by the district court. Thus, most narrowly, it accepted the view that "the evidence of the case supports the finding that the teacher experience in the designated core area schools is less than that which exists in other Denver schools" (A. 143a-144a); and, most broadly, "we cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation may in fact create an inferior educational atmosphere" (A. 145a). It rejected, however, the district court's conclusion that the resulting unequal educational opportunity was remediable by court order.[12] It did so on the explicit ground that "a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination" (A. 144a); that there was no racially motivated segregation established, and, therefore, that there could be no court enforced desegregation whatever the inequality resulting from the segregated nature of the schools (A. 145a-46a).

---

[12] The court of appeals, in result, barred implementation of the district court order requiring desegregation of 17 core area schools.

II

ARGUMENT

A. Introduction and Summary of Argument.

This is the first school desegregation case involving a district outside the South to be heard by the Court. At issue is the constitutionality of segregated schools located in a portion of the Denver School District, the so-called core area, which provide inferior educational opportunities for the minority children who attend them. The segregation of these schools results from the adherence by the Denver School Board to a so-called "neighborhood school policy" whereby the children in this segregated residential area are assigned to schools located near their homes.

Two fundamental issues are presented: First, whether the courts below applied the proper rules of law in determining if the school board acted with a racial purpose in adhering to a student assignment policy for the core area schools which resulted in the segregation and inferior educational opportunities. If the board's action was motivated by race, the existing segregation is de jure and constitutes a violation of the Equal Protection Clause. Second, assuming that the board did not act with such a racial purpose, whether its student assignment policy for the core area schools was nonetheless barred by the Constitution because the segregation it produced resulted in inferior educational opportunities for minority children and because that policy served no compelling state need.

Before urging upon the Court the principles that we contend are controlling, we believe two preliminary observations are in order.

First, school boards have real options in selecting an assignment plan. Many boards—including the predeces-

sor of the defendant board—have determined that the convenience involved in assigning children to schools relatively closer to their homes is outweighed by the educational advantages of eliminating segregated conditions which breed inequality of educational opportunity. Thus, where a school board adheres to a so-called "neighborhood school" plan which has the effect of preserving segregation, it is incorrect to assume that the board would have maintained such a policy irrespective of any purpose to segregate. Faced with the cancerous conditions of segregation, an objective board, free of racial bias and racial pressures, could well opt, indeed might be *likely* to elect, to correct those conditions.

Second, a "neighborhood school policy" [19a] lends itself to purposeful school segregation in urban areas. In large black ghettos where students traditionally have been assigned to schools on the basis of attendance zones which reflect the residential segregation, a board can effectively maintain nearly perfect segregation in the heart of the ghetto merely by renewing the attendance zones and refurbishing existing facilities. On the other hand, at the fringes of the ghetto it may be necessary to manipulate attendance zones and building programs because the racial composition of these areas is in flux. Thus, in detecting whether a school district is utilizing a "neighborhood school" plan for purposes of racial segregation, the most probative evidence will involve acts taken with respect to the schools located on the fringes of the ghetto.

Because neither of the lower courts considered these factors, their analyses of whether de jure segregation existed in the core area schools were skewed. Both courts focused on the era of the 1950's when the core schools became segregated. Having found that the segregation

[19a] The term "neighborhood school policy" is an imprecise term susceptible to a variety of meanings. See, *infra*, pp. 49-50.

of the 1950's was not purposeful, the lower courts terminated their inquiry as to the core area. They did not question whether during the 1960's the school board, rather than employing some other student assignment plan, maintained the "neighborhood school plan" in the core area for the purpose, at least in part, of perpetuatting school segregation.

If the lower courts had considered the board's reasons for maintaining a "neighborhood school policy" during the 1960's, they would have found persuasive evidence of racially discriminatory motive. During this period the school board was systematically manipulating the "neighborhood school plan" to maximize segregation in the expansion area of the ghetto (Park Hill). This racially motivated manipulation, arguably, at the very least, lays bare the reason why the school board continued to reapply the "neighborhood school plan" in the core area where—to the knowledge of the Board—the plan was producing educational inequality.

In this brief, NEA submits two contentions concerning the proof of de jure segregation in the core area, and a third contention that the inferior education offered in the core schools constitutes a denial of equal protection even if it is not the product of de jure segregation.

We urge that the district court's approach to the evidence, which was affirmed on appeal, was erroneous. First, the district court compartmentalized the evidence of segregation. In determining whether the "neighborhood school plan" was being maintained and administered for discriminatory reasons the district court ignored other evidence of discrimination, including the deliberate discrimination in the Park Hill area. Such an approach is contrary to the longstanding principle that where motive is an issue, related acts showing a similar motive are probative.

Second, the lower courts erroneously allocated the burden of proof. Plaintiffs proved that during the 1960's the school board was purposely manipulating the "neighborhood school plan" to assure racial isolation in the fringe area of the black residential district. There the "neighborhood plan" would not, without adjustment, fully segregate the children. This proof of racial manipulation, we urge, made out at least a prima facie case that in the core area during the 1960's the "neighborhood school plan" was being maintained and administered for racially discriminatory reasons.

Assuming that the segregation of the core area was not purposeful, there remains the issue whether the inferior educational opportunities resulting from segregation of the core schools, when compared to other Denver schools, constitute a denial of equal protection. In resolving this issue the lower courts should have applied the compelling governmental interest standard. That standard applies because education is a fundamental interest and Denver's student assignment plan denies equal educational opportunities to minority group children. Both courts below, however, misapplied this test. The trial court failed to consider whether the Denver assignment plan served any compelling governmental interest that would justify the educational inequalities that it was producing. The court of appeals, on the other hand, erred in holding that maintenance of a "neighborhood school plan" is constitutional as a matter of law notwithstanding findings that the segregation it produces results in inferior educational opportunities for minority children.

B. The Courts Below Employed Erroneous Standards of Evidence and Proof in Determining Whether the Denver School Board Acted with a Purpose To Segregate the Core Area Schools.

1. Evidence of the School Board's Actions Throughout the School District Must Be Considered on the Issue of Motivation.

The district court, with the approval of the court of appeals on review, found as to the schools in the Park Hill area that "[b]etween 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students" (A. 33a). As to the segregated schools in the core area, however, the district court, again with the approval of the court of appeals, found no such discriminatory purpose either incident to the specific acts of selection of sites for new schools or changes in school boundaries or incident to the board's strict adherence to a neighborhood school policy. This finding, as we have shown, *supra*, pp. 13-17, was predicated exclusively on the evidence respecting the actions of the school board in the core area. The district court's attempt to identify the "purpose" underlying those actions was taken without visible regard to the often-concurrent actions taken by the board in the Park Hill area, which were found to have been racially motivated, or to the objectively measurable discrimination against the minority schools in the core area which the court found to exist in faculty placement and physical facilities (see, *supra*, n. 10 and pp. 17-18).

We do not know why the district court, and in turn the court of appeals, took so restrictive a view of the evidence before them as to the fundamental issue of the motive or purpose with which the actions of the school board were taken. Whatever the reason, we think their approach to the evidence plainly improper. For it is now firmly established in the federal courts that the determination of

such an issue can only be made by reference to the whole surrounding course of conduct of the party involved, not solely by reference to a single act of the party viewed in isolation.

This principle dates back to, and before, the leading federal decision, *Wood* v. *United States*, 41 U.S. (16 Pet.) 341 (1842). In that case the defendant was charged with filing false invoices in connection with four shipments of goods in 1839 with the purpose of evading or defrauding the United States. At trial the court admitted evidence of 25 other fraudulent importations by the defendant in 1839 and 1840, fifteen of which were made before, and ten after, the four in suit. Over defendant's objection, this Court held that evidence of these similar transactions was admissible to establish the defendant's motive or intent. In the Court's opinion Mr. Justice Story said (41 U.S. at 358-59, emphasis supplied):

> The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is a matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. *Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.* . . .

Since that decision, the principle that a party's full course of conduct is to be considered on the issue of motive or purpose has been given effect in the widest possible range of contexts. Thus, under the criminal law evidence of like transactions is deemed relevant to the issue of intent:

> It was important in the actions on trial to discover the motive of the defendants, whether what they did at the time in question was the casual conduct of innocent parties intent upon their own lawful affairs, or whether it was inspired by the fraudulent purpose of assisting in the spoliation. It is the settled rule that in such a case evidence of similar acts at other times is admissible. The theory of the rule is that a succession of like instances tends to illustrate the character of the act under investigation and to negative innocence in the particular case. It is especially applicable where there is a charge of complicity in a scheme to defraud pursued as a vocation. Such a scheme is naturally conceived in secrecy, and the part of the defendant may be the performance of some act which furthers the accomplishment of the unlawful design, but which, when isolated from that which preceded and followed, may bear the aspect of innocence. Yet proof of a recurrence of similar acts in other cases where like frauds were perpetrated may be persuasive proof of a guilty purpose and so disclose the true character of the whole. [*Exchange Bank* v. *Moss*, 149 Fed. 340, 342 (8th Cir., 1906)]

See also *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953). So too, under the anti-trust laws, it is the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 705 (1948). *Accord, Standard Oil Co.* v. *United States*, 221 U.S. 1, 46-47, 75-76 (1911); *United States* v. *Reading Co.*, 253 U.S. 26, 43-44 (1920); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). Again, in the many contexts under the National Labor Relations Act where an employer's "good faith" or motive is an operative element of the determina-

tion to be made, it is the established rule that "the Board must inquire into the 'totality of the employer's conduct.'" *N.L.R.B.* v. *Cascade Employers Assn., Inc.*, 296 F.2d 42, 47 (9th Cir. 1961). *Accord*, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 139-40 (1st Cir. 1953); *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965); *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 741-42 (D.C. Cir. 1950); *N.L.R.B.* v. *National Seal Corp.*, 127 F.2d 776, 778 (2d Cir. 1942).

This rule has been applied repeatedly in the very context now before the Court. The federal courts have recognized in many school segregation cases the necessity that a trial court consider all the actions of a school board throughout the district when passing on the subjective, and often elusive, question of "purpose" or "motivation." [14] Ironically, the Tenth Circuit's own decision in *Downs* v. *Board of Education of Kansas City*, 336

---

[14] Compare *Brown* v. *Gaston County Dyeing Machine Co.*, No. 71-1268 (March 28, 1972) (Slip op. pp. 10-12), where the Fourth Circuit said:

> "Courts have often observed that proof of overt racial discrimination in employment is seldom direct. *E.g.*, United States v. Jacksonville Terminal Co., —— F.2d ——, ——, No. 30,448 at 51 (5th Cir., Aug. 31, 1971); Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (8th Cir. 1971); Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E. 2d 581, 584 (1954). Recognizing this, we have found 'error in limiting Title VII to present specific acts of racial discrimnation.' United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970), and it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists. United States v. Jacksonville Terminal Co., —— F.2d ——, ——, No. 30,448 at 42, 51 (5th Cir., Aug. 31, 1971); Graniteville Co. v. EEOC, 438 F.2d 32, 41 (4th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); United States v. Hayes International Corp., 415 F.2d 1038, 1044 (5th Cir. 1969)."

F.2d 988 (1964), provides one of the clearest statements on this point. There the court of appeals reviewed the board's minority transfer policy, its neighborhood school policy, changes in the attendance lines, and the racial imbalance of the faculty at various schools. The court then held (*id.* at 997, emphasis added):

> It follows from what has been said that none of the factors relied upon by appellants, when considered alone, is sufficient to establish a denial of their constitutional right not to be discriminated against because of race or color. *The crucial question, however, is whether all of these factors considered together are sufficient.*

The Fifth Circuit is in accord:

> In this case the essence of the complaint is purposeful discrimination against Negroes as a class. The inquiry into purpose makes it especially appropriate for the Court:
>
> > (1) to study the case as a whole, weighing all of the evidence and rational inferences in order to reach a net result . . . . [*Meredith* v. *Fair*, 305 F.2d 343, 360 (5th Cir. 1962)]

Similarly, the district court in its decision in the *Pontiac* case[15] emphasized that:

> If this Court's attention were directed and limited solely to the location of the Bethune School without being confronted by or concerned with the total pattern which was, at the time, developing in the construction of new schools in the system, the School Board may have succeeded in providing a persuasive argument here, as it did earlier, that the location of the Bethune School could be justified on the grounds of the existing criteria, namely, nearness, capacity and safety of access routes. However, this

---

[15] *Davis* v. *School District of City of Pontiac, Inc.*, 309 F. Supp. 734, (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971).

> Court's consideration is not limited or directed solely to the location of the Bethune School, but has been broadened to take into consideration the composition of the entire Pontiac School System. [309 F. Supp. at 741]

The Sixth Circuit, on review, concurred in this approach:

> Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years. [443 F.2d at 576]

Other lower federal courts similarly have affirmed the requirement that the school authorities' "course of conduct" is to be "viewed in its totality," [16] and have stated that board actions must be "read against a background" of relevant facts.[17]

In the cases now before the Court, each of the courts below failed in any discernible way to take into account, in evaluating the motivation underlying the school board's actions outside the Park Hill area, the sustained acts of segregation practiced with respect to the Park Hill schools. Nor did the courts look to the "pattern" of school board conduct in the school district as a whole. On the evidence, given the bald segregatory policies being pursued in the Park Hill schools, we think no objective analysis of the evidence as a whole could have failed to identify a policy of segregation which affected the board's conduct in the core area and colored its adherence there to a neighborhood school policy. It is sufficient for present purposes, however, that the courts below

---

[16] *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181, 195 (S.D. N.Y. 1961), *aff'd in part*, 294 F.2d 37 (2d Cir. 1961).

[17] *Evans* v. *Buchanan*, 173 F. Supp. 891, 892 (D. Del. 1959), *rev'd on other grounds*, 281 F. 2d 385 (2d Cir. 1960).

made no attempt to analyze actions directed to the core area schools against the school board's total pattern of conduct. For this reason alone, the judgment of the court of appeals as to the core schools should be reversed.

2. *School Authorities Have the Burden To Justify Segregated Schooling in any Part of the School System Once De Jure Segregation Has Been Established in a Transitional Area.*

The courts below, as we have shown, adopted an excessively restrictive view of the evidence to be considered in determining whether the Denver School Board had practiced de jure segregation outside the Park Hill schools. This error was compounded in the allocation of the burden of proof on this issue between the parties.

In the court of appeals, petitioners urged that they had been "required to labor under an erroneous burden of proof," but the Tenth Circuit approved the district court's handling of the burden (A. 147a). The court of appeals held that "where . . . no type of state imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that racial imbalance exists and that it was caused by intentional state action" (A. 148a). And the court imposed on plaintiffs the burden of proving such a discriminatory motive with respect to each school in the core area notwithstanding its finding that the board had purposefully segregated the Park Hill schools.

We consider the position of the court of appeals on the issue of burden of proof seriously in error. If allowed to stand, it would have grave consequences with respect to segregated schools in urban communities of the North and West since plaintiffs would be required to bear the virtually insurmountable burden of proving separately for each and every school that segregation was the result of willful discrimination by the school board. In our

view, where, as in the instant case, plaintiffs have met the burden of establishing that school authorities have intentionally acted to establish or maintain segregation in a transitional area of the school district, the burden should shift to the school authorities to prove that segregation in the remaining areas is not purposeful.

a. The Governing Principles.

The authorities make clear that there are no hard and fast standards governing allocation of the burden of proof in every legal setting. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." IX Wigmore, *Evidence* § 2486 (1940 ed.). In the context of racial segregation, the courts, including this Court, have recognized a range of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions when challenged in litigation. These have direct application to the facts now before the Court.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), this Court observed that the existence of a one-race school was not conclusive evidence that the system "still practices segregation by law." But, "in a system with a history of segregation" a presumption against racially disproportionate schools is warranted. Again, in a school district with a history of segregation, the discharge of a disproportionately large number of black teachers incident to desegregation has been held to raise a presumption of discrimination which "thrusts upon the School Board the burden of justifying its conduct by clear and convincing evidence." *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 193 (4th Cir. 1966) (en banc). This follows because (Id.):

> Innumberable cases have clearly established the principle that under circumstances such as this where a

history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts.

See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 887-88 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (1967), *cert. den.* 389 U.S. 840; *North Carolina Teachers Ass'n.* v. *Asheboro City Board of Education*, 393 F.2d 736, 743 (4th Cir. 1968) (en banc); *Williams* v. *Kimbrough* 295 F. Supp. 578, 585 (W.D. La., 1969); *Bonner* v. *Texas City Independent School District*, 305 F. Supp. 600, 621 (S.D. Tex., 1969); *Armstead* v. *Starkville Muncipal Separate School District*, 325 F. Supp. 560, 570 (N.D. Miss. 1971), *appeal pending*, No. 71-2124; *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706, 720 (N.D. Miss. 1971), *appeal pending*, No. 71-2581.[18]

In seems to us that when school authorities have evidenced a pattern of affirmative and purposeful segregatory action within one area of a school district, logic compels a presumption that these same authorities will be motivated by the same illegal considerations and impelled to parallel action elsewhere in the school district should the occasion or need arise. There is, to our knowledge, nothing in the history of school segregation suggesting that a single school authority can be expected

---

[18] Similarly, in the jury selection cases, this Court repeatedly has held that a substantial disparity between blacks and whites selected for juries when coupled with a showing of procedures which would permit or facilitate racial discrimination constitutes a prima facie case of invidious discriminaton. *Alexander* v. *Louisiana*, No. 70-5026, 36 U.S.L.W. 4365 (decided April 3, 1972); *Turner* v. *Fouche*, 396 U.S. 346, 361 (1961); *Eubanks* v. *Louisiana*, 356 U.S. 584, 587 (1958); *Avery* v. *Georgia*, 345 U.S. 559 (1953). The Court has ruled in such cases that "once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander* v. *Louisiana*, *supra*, at 4367.

to pursue an active policy of segregation in one area of the district it administers, while concurrently pursuing a policy of neutrality elsewhere within the district. Thus, common sense as well as the authorities discussed above strongly support our claim that proof of de jure segregation in one group of schools justifies a rule imposing on school authorities the burden of establishing that segregation found to exist in other schools within the same district is not the result of their illegal actions.

b. The Tenth Circuit's Ruling on Burden.

According to the Tenth Circuit, "it would be incongruous to require the Denver School Board to prove the nonexistence of a secret, illicit, segregatory intent" (A. 147a). Colorado has never, by legislation, required segregated educational facilities (A. 126a). Thus, the court held that (A. 148a):

> Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on the plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action.

As the court put it, "Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent" (A. 147a). On the other hand, if Denver were located in Oklahoma or some other state in the South where at some point in time segregated schooling had prevailed by virtue of legislative fiat, the Tenth Circuit would have decided this case differently. *United States* v. *Board of Education of Tulsa County*, 429 F.2d 1253 (10th Cir. 1970). See also A. 147a.

In our view, the analysis adopted by the Tenth Circuit is indefensible, both in principle and as applied to the facts of this case.

(1) When it came to the allocation of the burden of proof, the court of appeals attached importance to the fact that there has never been state imposed segregation in Colorado. But in an earlier section of its opinion, that court emphasized that the Fourteenth Amendment's prohibition against racial discrimination reaches not only actions of the legislature but also the actions of other state agencies, and that there is "no rational explanation why state imposed segregation of the sort condemned in *Brown* should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers" (A. 134a). In short, the court of appeals first demonstrated the irrelevance of a distinction between discrimination required by legislation and discrimination voluntarily but purposefully undertaken by a public school board, but then the court inexplicably refused to apply its own compelling logic on the issue of burden. We see no reason why the existence of the presumption of discrimination should turn on whether the history of discrimination is one compelled by state law or is the product of voluntary action of the very school board under scrutiny.

(2) The court of appeals' treatment of the facts reveals a related inconsistency. In placing on plaintiffs the burden of proving discriminatory motive, the court reasoned that "[s]uch an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent" (A. 147a). While advancing this reason for its ruling, however, the court ignored the findings of the district court, affirmed in part on appeal, to the effect that the board, for a decade at least, had deliberately discriminated against black children in the Park Hill area.

We submit that the allocation of the burden of proof as to the core schools was erroneous. Simply as a matter of common sense, public officials who deliberately discrim-

inate with their left hand should be called upon to show that other conditions of segregation within their school district have not been wrought with their right hand.

3. *The District Court Erred in Requiring a Showing that the Segregation of Each School in the Core Area Was Caused by Discriminatory Actions, Such as Boundary Changes, Aimed at the Individual School.*

A word is in order concerning the trial court's allusions to questions of causation. The court suggested with varying degrees of specificity that certain individual acts of the school district during the 1950's and early 1960's (see, *supra*, pp. 13-14), even if found to have been racially motivated, were not the proximate cause of the segregation of the core area schools existing at the time of the trial, given the board's neighborhood school policy and the racial housing patterns (*supra*, p. 17).

In our view whether the specific acts of the 1950's and early 1960's created or originated the segregation in some core schools is beside the point. The point is that throughout the 1960's the Denver School Board annually assigned children to their respective schools. Each year the board used a "neighborhood school plan." And each year the plan produced segregated schooling. The board did this despite its receipt of formal reports and studies advising of the segregation and inferior educational offering which the "neighborhood school plan" was producing for minority children (A. 127a-128a).

Clearly the decision to adhere to the "neighborhood plan" had the direct result of continuing the segregation in the core area schools. Thus, the key issue, in amici's view, with respect to plaintiffs' claims concerning de jure segregation was whether the board acted for a racial purpose in deciding to maintain a "neighborhood school policy" in the core area—despite its knowledge that the

resulting segregation afforded inferior educational opportunities to the minority students. The evidence of the segregatory motive behind other contemporaneous actions of the board is directly relevant to the evaluation of the board's purpose in determining to adhere to the "neighborhood school policy" which, without question, was a major cause of the continued segregation of the core area schools.[39]

C. The Court of Appeals Erred in Holding that the Constitution Prohibits Only Purposeful Denials of Equal Educational Opportunity and that in any Event Such Denials Are Justified as a Matter of Law When They Result from the Operation of a "Neighborhood School Plan."

1. *Introduction.*

In the first section of our brief we have discussed the lower courts' failure to apply proper standards of proof in evaluating plaintiffs' evidence establishing that the extensive segregation throughout the Denver public school system was deliberate. In the balance of this brief we assume arguendo that the segregation in the core schools was not deliberate. Viewed in that light the case takes on fundamental importance, for it presents the question whether the Fourteenth Amendment renders unconstitu-

---

[39] Plaintiffs are urging, *inter alia:* that the record leads inescapably to the conclusion that the Denver School Board has engaged in actionable, de jure segregation throughout the school district and that this Court should itself find that the segregation in the core area was de jure. We believe that course is commended by *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969). In the event the Court should wish to follow some alternative path in remedying the procedural deficiencies of the courts below, we urge that the proceeding be remanded to the trial court with instructions that the district court (a) consider the pattern of school board actions throughout the district in passing on the issue of its motivation with respect to segregated schooling in the core area, and (b) place on the school board the burden of establishing that segregated schooling, where it exists within the district, is not the result of illegal state action.

tional school segregation, whether or not purposeful, which results in educational opportunities for black students unequal to those available for white students.[20]

The factual predicate framing this important question is not in dispute. For as we explained in our statement of this case, *supra*, pp. 17-18, 21, *both* lower courts were in agreement that the facts of record established that segregation in the Denver public schools results in inferior educational opportunities for minority children. Thus, the trial judge found that the children assigned to the

---

[20] It may be suggested that the position advanced here is inconsistent with the so-called "de facto" cases in the lower courts. See, *e.g.*, *Bell* v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 337 U.S. 924 (1964); *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965). But see *Evans* v. *Ennis*, 281 F.2d 385, 389 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *Branche* v. *Board of Educ. of Hempstead*, 204 F. Supp. 150 (E.D. N.Y. 1962); *Blocker* v. *Board of Educ. of Manhasset*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Barksdale* v. *Springfield School Comm.*, 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); *Booker* v. *Board of Educ. of Plainfield*, 45 N.J. 161, 212 A.2d 1 (1965); *Jackson* v. *Pasadena City Bd. of Educ.*, 59 Cal. 2d 876, 31 Cal. 606, 382 P.2d 878 (1963). However that may be, this is the first time that this Court has considered the issue on its merits, and we believe the de facto cases should not be regarded as persuasive. To the extent that the plaintiffs in the *Bell*, *Deal* and *Downs* line of cases rested their claims on the theory that the Constitution requires racial balance in the schools (see, *e.g.*, *Bell*, *supra*, 213 F. Supp. at 828; *Deal*, *supra*, 369 F.2d at 58), the decisions are irrelevant. Plaintiffs have not urged such a theory and we make no such claim. To the extent that the decisions are predicated on a finding that state action was absent, the decisions are erroneous. Ample state action is present when school boards draw the attendance zones, locate the schools, assign the students and compel the attendance of students at those schools. The leading de facto cases (*Bell*, *Deal*, and *Downs*), moreover, did not present to the courts a factual record and findings, present here, showing the educational harm suffered by black students in racially identifiable black schools. Finally, to the extent that the *Bell*, *Deal* and *Downs* cases relied on a requirement that a discriminatory purpose must be shown, they are inconsistent with decisions of this Court. See, *infra*, pp. 46-48.

segregated core schools showed significantly lower scholastic achievement and significantly higher dropout rates. The court observed that these adverse consequences were attributable in part to factors such as "home and community environment, socio-economic status of the family, and the educational background of the parents . . . ." But even so, "we cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." (A. 84a.) "Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation in the name of neighborhood schools and housing patterns" (A. 89a).[21] So too, it was the view of the court of appeals that "[w]e cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere" (A. 145a).

The issue, rather, is as to the principles of law to be applied to these facts. On this question the courts below disagreed. The trial court ruled that the proven inequalities must be remedied. "Where state action, even if nondiscriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest" (A. 87a). In other words, the "present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to inferior schools." (A. 88a.)

[21] See also, A. 86a-87a.

The court of appeals disagreed and reversed. It is difficult to tell precisely why. Evidently it did so for either of two reasons. First, it appears to have been the position of the court of appeals that the Fourteenth Amendment, at least as interpreted in *Brown*, prohibits school segregation only when it is purposeful, regardless of the effect of such segregation. Alternatively, the court of appeals appears to have been of the view that a school board's employment of a neighborhood school policy, if not shown to be motivated by a purpose to segregate, suffices in and of itself to excuse any resulting educational inequality inflicted on minority children within the school district. The court thus stated "that the law in this circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools . . ." (A. 144a).[22]

NEA contends that the district court, rather than the court of appeals, used the proper standard for determining whether Denver's segregated schools are permissible under the Fourteenth Amendment.[23] In our view, where it is established that segregated schools afford minority children unequal educational opportunities, the school district must show that the policies responsible for the segregation serve a compelling governmental interest. Absent such a showing, the inequality constitutes a violation of the Equal Protection Clause. The court of ap-

---

[22] Elsewhere the court said "the rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance" (A. 134a).

[23] As we explain below, *infra*, p. 52, we believe that the district court misapplied this standard. The court failed to make any findings concerning the advantages of the neighborhood school system and failed to determine whether such advantages, if any, amounted to a compelling justification for the deprivations that the neighborhood school policy was found to inflict upon the minority group children in the district.

peals thus erred in ruling that the Fourteenth Amendment prohibits segregation only when it is purposely aimed at a minority group, and/or in adopting the position that a neighborhood school policy is a per se justification for the educational inequalities that are caused by the adventitious maintenance of segregated schools.

We discuss below our claim that the "compelling governmental interest" test is the standard which must be applied in cases such as this, where the proof establishes that segregated schooling within a school district denies equal educational opportunities to minority children. We follow this with a discussion of the alternative arguments which the court of appeals appears to have advanced in reaching a contrary result.

2. *The Compelling Governmental Interest Test Is the Proper Standard for Judging Whether Denver's "Neighborhood School Policy" Satisfied the Equal Protection Clause.*

The Fourteenth Amendment, in terms, speaks of "equal protection of the laws." Federal courts have interpreted the clause to place on the state the burden of justifying any state action which impinges unequally and unfairly upon a group or an individual.[24] As the law has developed, two distinct standards have been applied to measure the validity of state action put in issue under the clause. One branch of the cases requires only that the state, in justification of a proven discrimination, demonstrate a reasonable basis therefor.[25] A second branch of the cases —applicable in circumstances where suspect classifications and fundamental interests are involved—requires

---

[24] *McLaughlin* v. *Florida*, 379 U.S. 184, 190-191 (1964).

[25] See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), and cases discussed therein.

the state to demonstrate a compelling governmental interest justifying the discrimination.[26]

As we have demonstrated above, both courts below are in agreement on the facts: the Denver school authorities have maintained segregated schooling by adherence to a "neighborhood school policy," and, as a result, have afforded minority children unequal educational opportunities. In determining whether this proven condition of inequality violated the Equal Protection Clause, the district court in essence applied that branch of the case law requiring the state to justify its actions by demonstrating a "compelling state interest." Thus, the district court held that where minority groups are consigned to inferior schools the probability that the assignment policy is unconstitutional "becomes almost conclusive" (A. 88a).

In our view, the district court's approach to the case was correct. We urge the Court to hold that once the plaintiffs demonstrate that school assignment policies have created segregated schools, which in turn provide inferior educational opportunities for minority children, a prima facie violation of the Fourteenth Amendment is established, which places upon the school district an obligation to show a compelling justification for its assignment policies.

We would urge this standard on the Court merely as a matter of principle if in fact the slate were clean and this were an issue of first impression. At stake in this case is the education of children—"perhaps the most important function of state and local governments," "the very foundation of good citizenship" and "a principal instrument" in the development of the individual's ca-

---

[26] See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969), and cases discussed therein.

pacities. See *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

But the slate is not clean. Recently, state and federal courts have recognized the paramount importance of education and have sought to assure equal educational opportunities to all children. Thus, five courts have required the state to show a compelling justification for school financing arrangements that in effect diminish the educational opportunities of children residing in poorer areas of the state. *Serrano* v. *Priest*, 5 Cal. 2d 584, 487 P.2d 1241 (1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Robinson* v. *Cahill*, No. L-18704-69 (Superior Court of New Jersey, Jan. 19, 1972), pp. 66-69 (slip op.); *Hollins* v. *Shoftstall*, No. C-253652 (Superior Court of Maricopa County, Arizona, January 13, 1971) p. 6 (slip op.); *Rodriquez* v. *San Antonio Independent School District*, C.A. No. 68-175-SA (W.D. Tex. Dec. 23, 1971) (3 Judge Ct.) *jurisdictional statement filed*, 40 U.S.L.W. 3513 (U.S. April 17, 1972) (No. 71-1332).

The case at bar presents an even more appropriate instance for employing the compelling interest standard. In this case the educational deprivation falls most heavily upon the children of minority groups. In the past when such groups have been burdened disproportionately by state action, this Court repeatedly has applied the compelling interest standard in determining whether the racial or ethnic group has been denied equal protection. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668 (1966); *McLaughlin* v. *State of Florida*, 379 U.S. 184, 196 (1965); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). Consistent with these rulings of this Court, lower courts called upon to judge state action neutral on its face but disproportionately burdening blacks have similarly required the state to establish a "compelling state interest"

in order to justify its action. *Hawkins* v. *Town of Shaw*, 437 F.2d 1286, 1288, 1292-93 (5th Cir. 1971), *aff'd en banc*, —— F.2d —— (No. 29013 March 27, 1972); *Armstead* v. *Starkville Municipal Separate School District*, 325 F. Supp. 560, 570 (N.D. Miss. 1971), *appeal pending*, No. 71-2124 (5th Cir.); *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706, 720 (N.D. Miss. 1971), *appeal pending*, No. 71-2531 (5th Cir.); *Western Addition Community Organization* v. *Alioto*, 330 F. Supp. 536, 539 (N.D. Cal. 1971); *Arrington* v. *Mass. Bay Transp. Auth.*, 306 F. Supp. 1355, 1358 (D. Mass. 1969); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967). *Cf. Dandridge* v. *Williams*, 397 U.S. 471, 485 n. 17 (1970).

We submit that the great purposes of the Fourteenth Amendment cannot be satisfied unless black children in school districts throughout the country are assured of educational opportunities equal to those provided to whites in the same districts. More than half of the nation's black children reside in the center cities.[27] For these children *Brown* v. *Board of Education* has no meaning so long as school boards are free to make student assignments which mirror in the schools, and compound the effects of, the residential segregation in the city.

NEA does not urge here, however, that a "neighborhood school policy" is per se unconstitutional. We leave open the possibility of circumstances which might justify it.[28] We urge only that, upon a showing that minority

---

[27] The official census for 1970 reveals that 58 per cent of the black population lives in inner city areas. U.S. Bureau of the Census, Census of Population in Housing 1970, *General Demographic Trends for Metropolitan Areas*, 1960-1970 (Final Report, October 1971), p. 33, Table 9.

[28] A district court should consider, for example, whether the segregation produced by a "neighborhood school policy" is detrimental to the educational development of the black children in those schools, whether the school district has embarked upon compensatory

students are afforded inferior educational opportunities in segregated schools, the state be required to show a compelling governmental interest justifying the policies responsible for such inequality. As the court put it in *Hobson* v. *Hansen*, *supra*, 269 F. Supp. at 508:

> If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (*e.g.*, unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this call is our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country. With these interests at stake, the court must ask whether the virtues stemming from the Board of Education's pupil assignment policy (here the neighborhood policy) are compelling or adequate justification for the considerable evils of *de facto* segregation which adherence to this policy breeds.

3. *The Court of Appeals Erred in Holding that Only Purposeful Discrimination Violates the Equal Protection Clause.*

The court of appeals in one of its alternative holdings rejected the standard we urge upon this Court because that standard does not make segregatory purpose

---

education programs that actually remedy the effects of racial segregation, and whether there is a practical alternative to the segregated conditions resulting from the "neighborhood school policy."

or invidious motive an element of the constitutional violation. In this regard the Tenth Circuit's ruling conflicts with the decisions of this Court.

To be sure, a discriminatory purpose may be relevant or even conclusive in establishing a Fourteenth Amendment violation. *Griffin* v. *Prince Edwards County*, 377 U.S. 218 (1964). *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960). But cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). Discriminatory motive is not a prerequisite, however. Last term this Court again eschewed the search for a discriminatory motive or intent, looking instead at the operative effect of the state action. *Palmer* v. *Thompson, supra*, 403 U.S. at 225. Traditionally this has been the manner in which the Court has tested state action against the requirements of the Equal Protection Clause. *Douglas* v. *California*, 372 U.S. 353 (1963); *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931); *Griffin* v. *Illinois*, 351 U.S. 12, 17 n. 11 (1956); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Bailey* v. *Alabama*, 219 U.S. 219, 244 (1911); *Home Insurance Co.* v. *New York*, 134 U.S. 594, 598-599 (1890); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 268 (1876).

Recently the Fifth Circuit sitting in banc was confronted with this issue. *Hawkins* v. *Town of Shaw*, No. 29013 (decided March 27, 1972). The court held that the unequal distribution of municipal services between the white and black residents of a town constituted a violation of the Fourteenth Amendment irrespective of motive or intent. Quoting from decisions of the Second Circuit, the court said in *Hawkins* (Slip op. p. 2):

> In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for 'equal protection of the laws means more than merely the absence of governmental action designed to discriminate; . . .

we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.' (emphasis supplied) *Norwalk Core* v. *Norwalk Redevelopment Agency*, 2 Cir. 1968, 395 F.2d 920, 931. See also *Kennedy Park Homes Association* v. *City of Lackawanna, New York* (2 Cir., 1970) 456 F.2d 108, 114, cert. den. 401 U.S. 1010 (1971) and *United States ex rel. Seals* v. *Wyman*, 5 Cir. 1962, 304 F.2d 53 at 65.

To conclude, the Tenth Circuit would hold plaintiffs to proof of discriminatory purpose. Such a requirement is not only at odds with the decisions of this Court and other federal courts but is inconsistent with the basic purposes of the Fourteenth Amendment. The gravamen of the Amendment is not the requirement that public officials act with a pure heart; rather the Amendment's basic purpose was to secure for blacks and other minority groups the same rights and privileges as are enjoyed by whites. *Palmer* v. *Thompson*, 403 U.S. at 220. See also, *e.g.*, *Slaughter House Cases*, 16 Wall. 36, 71-72 (1873).

4. The Court of Appeals Erred in Treating the Defendants' "Neighborhood School Policy" as a Per Se Justification for the Unequal Educational Opportunities Afforded to Minority Children.

As we read the Tenth Circuit's decision, the court held in the alternative that the inequalities arising from Denver's segregated schools—however serious and detrimental to the interest of minority groups in general or minority children individually—were justified by the school district's adherence to a "neighborhood school policy." The court reached this conclusion, not on the basis of evidence in the record, but on the basis of its holding and dicta relating to school assignment policies in Kansas City, Oklahoma City and Tulsa. *Downs* v. *Board of Education*

of Kansas City, 336 F.2d 988 (1964), *cert. denied*, 380 U.S. 914 (1965); *Board of Education of Oklahoma City* v. *Dowell*, 375 F.2d 158 (1967); *United States* v. *Board of Education of Tulsa County*, 429 F.2d 1253 (1970). Citing these cases, it declared: "The law in this Circuit is that a neighborhood school policy is constitutionally acceptable even though it results in racially concentrated schools . . ." (A. 144a). In effect the court held that educational inequality resulting from racially segregated schools is constitutional per se if it is produced by a "neighborhood school policy." We believe the court erred.

NEA and CEA urge that a strong evidentiary showing, at the very least, should be required to justify educational inequality stemming from segregated schools. The existence of a constitutional right, including the right to equal protection of the laws, should not turn on mere lar student assignment plan which has the effect of pre-

The phrase "neighborhood school" at best is amorphous. As this Court observed in another context, "The word 'neighborhood' is quite as susceptible of variation as the word locality. Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Connally* v. *General Const. Co.*, 269 U.S. 385, 395 (1925). Nor have school administrators poured definite content into those words.

Generally, the term "neighborhood school policy," when used to describe a school board's student assignment plan, may be understood to mean that the factor of distance from home to school is taken into account. Typically, distance is but one of a substantial number of factors,

---

[10] E.g., *Taylor* v. *Board of Education*, 191 F. Supp. 181, 194 (S.D.N.Y. 1961). Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969); *Sostre* v. *McGinnis*, 442 F.2d 178, 196 (2d Cir. 1971); *Knight* v. *State Board of Education*, 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

including safety, natural obstacles, utilization of classroom space, economics, etc., given varying weights by the board in varying circumstances. In Boston, for example, schools once were built in isolated areas rather than the center of "neighborhoods" because land in those areas could be purchased at reduced cost. See Weinberg, *Race & Place* 7 (1967). According to the most recent available statistics, covering the school year 1967-68, 42 percent of the nation's pupils in average daily attendance were transported to schools at public expense. U.S. Dept. HEW, Office of Education, *Statistics of Public Schools* 7-8 (Fall 1970). This fact constitutes irrefutable proof that school boards across the United States give greater weight to considerations other than the convenience of the "walk-in school" in formulating student assignment plans.

Manifestly, in framing a student assignment plan, a school board should consider various educational objectives. The weight given to those factors will dilute that allocated purely to proximity. For example, the board may decide to eliminate two small, inefficient schools and substitute one large school, with a broader attendance area, which can offer a more substantial program. School boards typically will draw larger attendance zones for junior and senior high schools than for elementary schools so as to insure student bodies of a size sufficient to sustain special programs and expensive facilities such as gymnasiums, swimming pools and theaters. As the court of appeals noted, in Denver the board "attempts to draw junior high school and senior high school boundary lines so that all students transferring from a given school will continue their education together" (A. 127a). Nonetheless, the ultimate assignment plan is commonly called a "neighborhood school plan."

The most evident benefit of a plan which gives relatively greater weight to the factor of proximity than to

overcoming school segregation is that it is more convenient for a larger number of students and parents. Convenience, however, is not so important as to require that all other educational values—or constitutional rights—be subordinated to it. "The first and most important consideration in determining a satisfactory attendance unit is the kind of educational program that is to be provided." [20] Many school systems, including the predecessor to the Denver board, have concluded that segregation, regardless of how it is caused, is educationally unsound, and have assigned students to schools other than those nearest their homes to overcome racial imbalance.

At the very least, a reasonable application of the compelling interest test requires a court to weigh the convenience of an assignment plan against the educational inequality it produces. In making such a judgment a court might also consider, for example, the relative inconvenience or burden that might result from an alternative plan which would minimize the segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*. Clearly a court cannot assess whether a particular student assignment plan which has the effect of preserving segregation and educational inequality serves values so compelling as to justify the plan without scrutinizing the elements of the plan, the actual objectives served and the alternatives available. The accordian-like nature of the term "neighborhood school policy" and its uncertain meaning preclude any per se rule sanctioning school segregation and educational inequality by mere incantation of the term. In adopting such a per se rule, the court of appeals erred.

---

[20] S. Cooper "Characteristics of Satisfactory Attendance Units" in R.T. Gregg (ed.), *Characteristics of Good Schools* 9 (1948).

5. The Appropriate Remedy Is To Remand this Branch of the Case for Trial of the Issue Whether Denver's "Neighborhood School Policy" Can Be Justified by a Compelling Governmental Interest.

It seems to us that if this Court does not dispose of the case on the ground that the record demonstrated purposeful segregation in the core area schools, it should remand this issue to the district court with instructions to resolve the question whether there are compelling governmental interests which justify the segregation and inequality in those schools. The trial court has yet to make findings regarding the objectives served by the student assignment plan of the Denver board, the respective values to be accorded to each of those objectives and the relation of those values to the costs of the segregation and resulting unequal education.

III

CONCLUSION

For the foregoing reasons the judgment of the court of appeals, insofar as it denies relief with respect to the core schools, should be reversed and the case remanded to the district court with instructions to (1) frame a remedy for the de jure segregation in the core area, or (2) in the alternative, (a) reconsider its finding that the board did not purposefully segregate the core area schools in light of its own finding that the board purposefully segregated the adjoining Park Hill schools and in light of the presumption of discrimination flowing therefrom, and (b) conduct hearings on the question whether the values served by the board's student assignment plan constitute a compelling justification for the

resulting segregation of the core schools and inferior education afforded thereby.

Respectfully submitted,

STEPHEN J. POLLAK
ROBERT T. BASSECHES
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D. C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Amicus Curiae
National Education Association

LARRY F. HOBBS
LEONARD N. WALDBAUM
HOBBS & WALDBAUM
1810 Security Life Building
Denver, Colorado 80202

Attorneys for Amicus Curiae
Colorado Education Association

Of Counsel:
SHEA & GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005